US DISTRICT COURT
WESTERN DIST ARKANSAS
FILED

FEB 16 2017

DOUGLAS F. YOUNG, Clerk
By
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

WINDOWS USA, LLC

Plaintiff,

v.

QUINSTREET, INC.; AND
QUINSTREET MEDIA, INC.

Defendants.

NO. 17-6021
JURY TRIAL DEMANDED
SOH

COMPLAINT

COME NOW the Plaintiff, Windows USA, LLC, by and through its undersigned attorneys, and for its Complaint alleges as follows:

NATURE OF THE CASE

1. This is an action at law and in equity for trademark infringement, false association and false advertising arising under the Federal Trademark Act of 1946 (the "Lanham Act"), 15 U.S.C. §§ 1114, 1125; trademark infringement arising under Ark. Code Ann. §4-71-201 *et seq*; for unfair and deceptive trade practices arising under the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. § 4-88-107, and for unjust enrichment arising under the common law of the State of Arkansas.

THE PARTIES

2. Windows USA, LLC is a limited liability company organized under the laws of the State of Arkansas, with its principal place of business located in Garland County, Arkansas, at 235 Sunshine Rd., Royal, Arkansas 71968 ("Windows USA" or "Plaintiff"). Windows USA is engaged in the business of marketing and selling a line of windows designed for residences. The windows sold by Windows USA meet the highest

quality standards and are sold throughout the United States. Windows USA's website, www.windowsusa.com, provides consumers with easy access to information about its products.

3. QuinStreet, Inc. is a corporation created under the laws of the State of Delaware, with its principal place of business located in Foster City, California ("QuinStreet").

4. QuinStreet Media, Inc. is a corporation created under the laws of the State of California, with its principal place of business located in Reno, Nevada ("QuinStreet Media"). On information and belief, QuinStreet Media is a subsidiary of QuinStreet, and supports QuinStreet's advertising and media network.

5. QuinStreet is registered to do business in the State of Arkansas pursuant to Ark. Code Ann. § 4-27-1501 *et seq.*

6. QuinStreet Media is registered to do business in the State of Arkansas pursuant to Ark. Code Ann. § 4-27-1501 *et seq.*

7. QuinStreet may be served through its registered agent in the State of Arkansas, Corporation Service Company, 300 South Spring Street, Suite 900, Little Rock, AR 72201.

8. QuinStreet Media may be served through its registered agent in the State of Arkansas, National Registered Agents, Inc. of AR, 323 Center St. Suite 1202, Little Rock, AR 72201.

9. QuinStreet and QuinStreet Media are collectively referred to herein as the "Defendants".

JURISDICTION AND VENUE

10. This action arises, in part, under the Lanham Act and for related claims of unfair competition. This Court has subject matter jurisdiction over the Lanham Act claims under 28 U.S.C. §§ 1331 and 1338, and the non-federal claims asserted herein pursuant to 28 U.S.C. § 1367(a) in that they are so related to the federal law claims in the action that they form a part of the same case or controversy under Article III of the United States Constitution.

11. Alternatively, the Court has original subject matter jurisdiction over this action, and the claims asserted herein, pursuant to 28 U.S.C. § 1332(a)(1) in that this is a civil action between citizens of different states and the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs.

12. Venue properly lies within the Western District of Arkansas pursuant to 28 U.S.C. § 1391 because the defendants reside in this district insofar as they are subject to personal jurisdiction in this District, and further, because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

13. The Defendants are subject to personal jurisdiction of this Court because they transact business, or are otherwise found and have purposefully availed themselves of the privilege of doing business, in Arkansas and this District, by and among other things, registering to do business in Arkansas pursuant to Ark. Code Ann. § 4-27-1501 *et seq.*, conducting their business in Arkansas and/or through the operation of internet websites, wrongfully using and infringing upon Window USA's goodwill and trademarks, and committing unfair acts within Arkansas as herein alleged.

GENERAL ALLEGATIONS

A. WINDOWS USA, LLC

14. In or about 1997, Erickson Supply and Construction, Inc., an Arkansas corporation having a principal place of business in Garland County, Arkansas ("Erickson"), began marketing and selling a line of residential windows in interstate commerce under the trade name WINDOWS USA. Due in part to the quality of Erickson's windows and its reputation for superior customer service, Erickson quickly became one of the largest retailers of windows in the Southeastern United States.

15. On or about November 6, 2000, Erickson filed an application to register a stylized design containing the words "WINDOWS USA" as a trademark with the U.S. Patent and Trademark Office ("USPTO"). On or about August 27, 2002, such mark was registered as U.S. Reg. No. 2,611,832 which contained a voluntary disclaimer as to the exclusive use of "WINDOWS USA" apart from the mark as shown on the Certificate of Registration, a copy of which is attached hereto as **Exhibit "A"** and incorporated by reference.

16. Despite the disclaimer associated with U.S. Reg. No. 2,611,832, the trade name "WINDOWS USA" (the "WINDOWS USA mark") subsequently became distinctive of Erickson's goods by attaining secondary meaning and an indication of source within the consumer marketplace. By 2008, Erickson was engaging in business exclusively under the WINDOWS USA mark and selling windows throughout the Southeastern and Midwestern United States, all of which resulted in substantial revenues. Between the years of 2004 and 2011, Erickson incurred advertising expenses in excess of $40,000,000 under the WINDOWS USA mark by way of direct mail, online marketing, telephone marketing and

customer referral marketing techniques. As a result of the long, continuous and exclusive use of the WINDOWS USA mark by Erickson, and extensive promotion and advertisement of its windows under such brand, the WINDOWS USA mark gained wide public acceptance and association with Erickson, both in this District and elsewhere, and became widely and favorably recognized by consumers as an indication of source in Erickson.

17. Due in large part to the substantial goodwill and value associated with the WINDOWS USA mark, on or about January 1, 2012, Windows USA purchased substantially all of Erickson's assets constituting its ongoing business. In accordance with such transaction, Erickson assigned to Windows USA all of Erickson's rights, title, interest and goodwill connected with and symbolized by the WINDOWS USA mark, and further, all of Erickson's rights to prosecute and defend such mark.

18. Since its acquisition of Erickson's business, Windows USA has continued to expand its sales and marketing efforts into other states and marketplaces, further increasing the exposure of the WINDOWS USA mark to the public. For the period of 2012 to 2015, Windows USA incurred advertising expenses in excess of $20,000,000 marketing the WINDOWS USA mark by way of direct mail, online marketing, telephone marketing and referral marketing techniques.

19. When Erickson began using the WINDOWS USA mark to sell windows, Erickson was engaging in or about ten states. Windows USA currently engages in business in approximately twenty-three states.

20. Between the years of 1996 and 2015, Windows USA, collectively with its predecessor, have sold over 1,600,000 windows under the WINDOWS USA mark which were installed in over 100,000 homes located throughout the United States.

21. On or about December 19, 2016, Windows USA registered the WINDOWS USA mark with the Arkansas Secretary of State pursuant to Ark. Code Ann. § 4-71-201 as being associated with its line of windows.

22. Windows USA is informed and believes, and thereon alleges, that the Defendants have made and are currently making interstate commercial use of Windows USA's distinctive, valuable and well-known WINDOWS USA mark and/or confusingly similar variations thereof on or in connection with internet advertisements for residential windows.

B. QUINSTREET, INC. & QUINSTREET MEDIA, INC.

23. The Defendants are marketing and digital media companies engaged in interstate commerce throughout the United States, including but not limited to the State of Arkansas, and provide marketing services to retailers of residential windows that engage in direct competition with Windows USA within the State of Arkansas and other states in which Windows USA engages in business (such competitors of Windows USA referred to hereinafter as "QuinStreet clients"). Upon information and belief, at least one QuinStreet client has a principal place of business in Garland County, Arkansas, less than twenty miles away from Windows USA's headquarters.

24. The Defendants receive a substantial portion of their revenue from internet "lead-generation" activities, whereby they organize, supervise and conduct online marketing campaigns designed to target consumers of products and services in a wide variety of industries, including but not limited to the residential window industry, and subsequently sell the consumer information they collect as customer leads to QuinStreet clients.

25. According to a website owned and/or operated by the Defendants, the Defendants' marketing campaigns direct consumers to over 200 home improvement websites that QuinStreet and/or QuinStreet Media "controls", which collectively receive "2,000,000+ unique visitors a month".

QUINSTREET **QuinStreet is one of the largest Internet marketing and media companies in the world.**

- Founded in 1999, a publicly traded company **(Nasdaq: QNST)** with $400+M in revenue
- Controls 200+ home improvement websites that get 2,000,000+ unique visitors a month
- Works with thousands of clients, including many Fortune 500 companies
- Offers full-service programs with dedicated account managers
- Provides measurable, accountable customer acquisition results
- We can provide partnership opportunities in a variety of verticals including Home Services, Education, Financial Services, B2B and Medical

Source (2/13/17): http://www.unitedhomeimprovement.com/for_publishers/who-we-are.html

26. On information and belief, such websites owned and/or controlled by the Defendants include but are not limited to the following: www.windowcosts.com, www.windowquotesus.com, and www.improvementcenter.com (collectively "the QuinStreet websites").

27. The Defendants conduct advertising campaigns for QuinStreet clients by publishing advertisements on multiple internet search engines, including but not limited to *Google.com*, *Bing.com*, *Yahoo.com* and *Ask.com.*

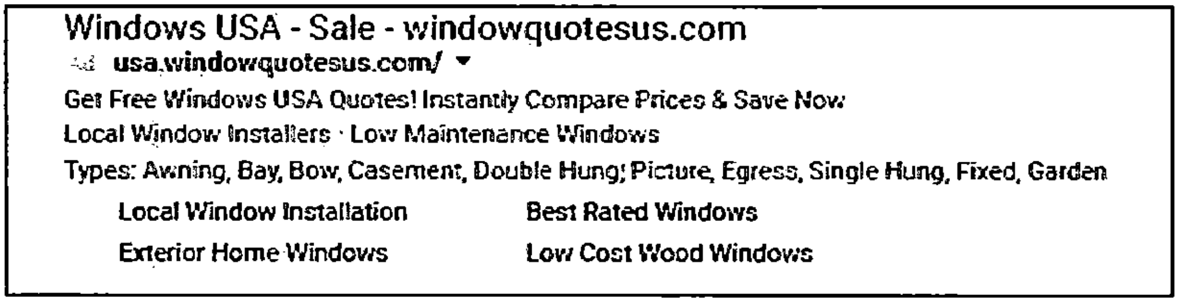
28. Such internet search engines provide advertising systems through which a company can pay to have advertisements appear in response to an internet search using designated "keywords." Such advertisements can be designed as "dynamic ads", whereby a specific keyword used in an internet search is automatically incorporated into the text of

the otherwise pre-drafted advertisement. Advertisers using such dynamic ads intentionally insert computer code into the advertisement commonly known as a "dynamic keyword insertion" to achieve the foregoing. Such internet search engine advertisements generally consist of a headline in bold-faced type, a website universal resource locator ("URL") placed below such headline, followed by the body of the advertisement.

29. Upon information and belief, the Defendants have paid such internet search engines to display their advertisements when consumers conduct internet searches using "keywords" constituting the trade names of numerous leaders in the residential window industry, including but not limited to Windows USA.

30. Upon information and belief, with knowledge of the reputation of Windows USA's products and prior use of the WINDOWS USA mark, the Defendants use the WINDOWS USA mark for their own pecuniary gain by inserting dynamic keyword coding within internet search engine advertisements, all in effort to deceive and confuse consumers into believing that the QuinStreet websites are owned by, operated by, affiliated with or endorsed by Windows USA.

31. As a result of the Defendants actions, a search for "Windows USA" conducted on such internet search engines will display an advertisement created and designed by the Defendants at or near the top of the search-results page, examples of which are as follows:


Windows USA - Sale - windowquotesus.com
usa.windowquotesus.com/
Get Free Windows USA Quotes! Instantly Compare Prices & Save Now
Local Window Installers · Low Maintenance Windows
Types: Awning, Bay, Bow, Casement, Double Hung, Picture, Egress, Single Hung, Fixed, Garden
Local Window Installation
Best Rated Windows
Exterior Home Windows
Low Cost Wood Windows

> Windows USA - Deals - Instant Windows USA Quotes
> Ad usa.windowcosts.com/ ▾
> Quickly Compare Window Costs Today
> Energy Efficiency Savings · Get The Best Price · Exclusive Window Pros · Save Time & Money
> Styles: Vinyl, Wood, Aluminim, Clad, Metal, Fiberglass
> Residential Home Windows · Affordable Vinyl Windows · Energy Efficient Windows

> Affordable **Windows USA** - Compare Affordable Window Prices.
> Ad · **WindowsPrices.ImprovementCenter.com**
> 1,200+ followers on Twitter
> Compare Affordable Window Prices. Get Affordable Window Quotes Today!
> Local Deals · Top Brands · Quality Products · Compare Prices

See also **Exhibit "B"** attached hereto and hereby incorporated by reference, which is a screen-shot demonstrating an internet search conducted for "Windows USA" on *Google.com* (highlights added).

32. Such advertisements are literally false, misleading and/or convey a false impression, in that neither the Defendants, the QuinStreet websites, nor any QuinStreet clients provide consumers with any "quotes" or information pertaining to the prices of Windows USA's products or services.

33. Such advertisements are literally false, misleading and/or convey a false impression, in that neither the Defendants, the QuinStreet websites, nor any QuinStreet clients offer consumers any information comparing Windows USA's products to those of its competitors.

34. Such advertisements are literally false, misleading and/or convey a false impression, in that neither the Defendants, the QuinStreet websites, nor any QuinStreet clients actually sell any products or services of Windows USA.

35. Windows USA has not granted the Defendants or any QuinStreet clients any form or right in the WINDOWS USA mark, or any other lawfully registered trademark, service mark, name or proprietary right of Windows USA.

36. Consumers, confused due to seeing "Windows USA" in the heading and body of the Defendants' advertisements, click the Defendants' advertisements which subsequently direct consumers to the QuinStreet websites whereby the consumer is immediately prompted to submit information pertaining to: (1) the window product the consumer is seeking; (2) the geographical location of the consumer; (3) the name of the consumer; (4) the contact telephone number and/or email address of the consumer; and (5) other relevant information pertaining to the consumer's interest in windows.

37. Upon information and belief, the Defendants then sell such consumer information to QuinStreet clients, generating substantial revenue for the Defendants.

38. After receiving such consumer information, QuinStreet clients contact the consumers, typically by phone, and proceed with marketing and selling windows to such consumers.

39. The conduct of the Defendants, as set forth above, has confused and will continue to confuse, mislead and deceive consumers, the trade and the relevant purchasing public into wrongly believing that the Defendants, the QuinStreet websites, and/or QuinStreet clients, their products and services are affiliated with, connected with, associated with, sponsored by, endorsed by, administered by, or supervised by Windows USA.

40. The Defendants' own actions of intentionally using "Windows USA" in their advertisements further evidence that the WINDOWS USA mark has attained distinctiveness and secondary meaning in the consumer marketplace.

41. The aforementioned activities by the Defendants materially affect interstate commerce among the several states in that the Defendants sell consumer information to QuinStreet clients located throughout the United States. The Defendants' false and misleading advertisements have a substantial economic effect on interstate commerce because the Defendants' advertisements reach across state lines to consumers throughout the United States, and further, cause Windows USA to suffer lost sales that would have otherwise been made across state lines.

42. Upon discovery of the Defendants actions described above, Windows USA requested that the Defendants cease and desist from the actions set forth above, but the Defendants have failed and refused.

COUNT I
TRADEMARK INFRINGEMENT
15 U.S.C. § 1114(1), COMMON LAW
& ARK. CODE ANN. §4-71-212

43. Windows USA repeats and incorporates by reference each and every allegation contained in the previous paragraphs, and further alleges the following.

44. The WINDOWS USA mark, which is used in interstate commerce and in connection with Windows USA's products and marketing materials, has been, and will continue to be, known throughout the United States as identifying and distinguishing Windows USA's business and its products from those of its competitors.

45. Without authorization or consent of Windows USA, the Defendants have used, and continue to use, the WINDOWS USA mark in connection with the sale, distribution and/or advertisement of windows and related goods and services.

46. By using the WINDOWS USA mark, and by selling, offering for sale, distributing, and/or advertising goods and/or services to the general public and in connection with such mark, for profit and without Windows USA's authorization, the Defendants are depriving Windows USA of its exclusive right to control, and benefit from, its trademark.

47. If permitted to continue, the Defendants' actions will nullify Windows USA's right to the exclusive use of the WINDOWS USA mark, free from infringement, and will have a substantial and adverse effect on Window USA's existing and projected interstate business of selling residential windows identified by its trademark.

48. The Defendants' use of the WINDOWS USA mark in connection with the sale, distribution and advertising of goods or products, without Window USA's permission or authority, has caused actual consumer confusion and is likely to continue to cause consumer confusion, to cause mistake, and to deceive, to the detriment of Windows USA and its customers and potential customers. Windows USA has been, and continues to be, damaged by the Defendants' activities and conduct.

49. The Defendants have profited thereby and, unless their conduct is enjoined, Windows USA's reputation and goodwill will continue to suffer irreparable injury that cannot adequately calculated or compensated by money damages.

50. As a direct and proximate result of the advantage accruing to the Defendants' business from Windows USA's extensive advertising, sales and consumer

recognition associated with the WINDOWS USA mark, and as a proximate result of the confusion, deception, and mistake caused by Defendants' wrongful acts as herein alleged, Windows USA has been deprived of substantial sales of its products and its reputation has been and continues to be damaged.

51. For the foregoing reasons, the Defendants' activities constitute trademark infringement in violation of 15 U.S.C. § 1114(1).

52. For the foregoing reasons, the Defendants' activities constitute trademark infringement in violation the common law.

53. For the foregoing reasons, the Defendants' activities constitute trademark infringement in violation of Ark. Code Ann. § 4-71-212.

COUNT II
LANHAM ACT FALSE ASSOCIATION – 15 U.S.C. § 1125(a)(1)(A)

54. Windows USA repeats and incorporates by reference each and every allegation contained in the previous paragraphs, and further alleges as follows.

55. The Defendants, by engaging in the false and misleading internet advertising and marketing practices described herein, have used and continue to use Window USA's name without the authorization or consent of Windows USA, all in an effort to deceive the public and cause consumer confusion as to the affiliation, connection or association of Windows USA with the commercial activities of the Defendants, including but not limited to Defendants' services provided by the QuinStreet websites.

56. The Defendants, by engaging in the false and misleading internet advertising and marketing practices described herein, have used and continue to use Window USA's name without the authorization or consent of Windows USA, all in an

effort to deceive the public and cause consumer confusion as to the origin, sponsorship or approval of the Defendants' services and/or the products sold by QuinStreet clients.

57. The Defendants, by engaging in the acts of false association described herein, have caused and will continue to cause Windows USA to suffer commercial injury the form of lost sales by diverting consumers away from the websites owned by Windows USA and directing such consumers to companies that directly compete with Windows USA.

58. Further, by diverting consumers away from websites owned by Windows USA, the Defendants' acts of false association have caused and will continue to cause Windows USA to suffer commercial injury to its reputation due to inferior goods and services being passed-off as products of or being endorsed by Windows USA.

59. For the foregoing reasons, the Defendants' activities constitute false association in violation of 15 U.S.C. § 1125(a)(1)(A).

COUNT III
LANHAM ACT FALSE ADVERTISING – 15 U.S.C. § 1125(a)(1)(B)

60. Windows USA repeats and incorporates by reference each and every allegation contained in the previous paragraphs, and further alleges as follows.

61. The Defendants have engaged and continue to engage in commercial advertising and/or promotion whereby the Defendants misrepresent to consumers: (i) that the QuinStreet websites provide "quotes" for Windows USA products or information pertaining to the prices of Windows USA products; (ii) that the QuinStreet websites provide information comparing Windows USA's products to those of its competitors; and (iii) that products of Windows USA can be purchased by and through the QuinStreet

websites and/or the QuinStreet clients. All of such representations are false statements of fact, misleading, and/or give rise to false consumer impression.

62. Evident by the false nature of such misrepresentations and further demonstrated by the fact that consumers arrive at the QuinStreet websites only after conducting an internet search for Windows USA's trade name, such misrepresentations have caused and continue to cause consumer confusion and are material in that they are likely to influence a consumer's purchasing decision.

63. The Defendants, by publishing the false and misleading advertisements described herein, have caused and will continue to cause Windows USA to suffer commercial injury the form of lost sales by diverting consumers away from the websites owned by Windows USA and by directing such consumers to direct competitors of Windows USA.

64. Further, by diverting consumers away from websites owned by Windows USA, the Defendants' false advertising has caused and will continue to cause Windows USA to suffer commercial injury to its reputation due to inferior goods and services being passed-off as those of Windows USA.

65. For the foregoing reasons, the Defendants' activities constitute false advertising in violation of 15 U.S.C. § 1125(a)(1)(B).

COUNT IV
VIOLATION OF ARKANSAS DECEPTIVE TRADE PRACTICES ACT

66. Windows USA repeats and incorporates by reference each and every allegation contained in the previous paragraphs, and further alleges as follows.

67. The Defendants have simulated and continue to simulate the trade name of Windows USA in commerce for the purpose of deceiving the public and obtaining the benefits that would have otherwise accrued to Windows USA.

68. The Defendants have profited and continue to profit from knowingly making a false representation as to the source, sponsorship, approval, and/or certification of the QuinStreet websites and the products of QuinStreet clients.

69. The Defendants have profited and continue to profit from the employment of bait-and-switch advertising consisting of an attractive but insincere offer to give price "quotes" and "deals" with respect to Windows USA's products which the Defendants in truth do not intend or desire to do, evidenced by the Defendants' refusal to show Windows USA's products to consumers who are deceived by the Defendants' false advertisements.

70. The conduct of the Defendants' constitutes unlawful, deceptive and unconscionable business practices in violation of Ark. Code Ann. § 4-88-107, all of which have caused and continue to cause injury to Windows USA in the form of lost sales and damages to Windows USA's reputation.

COUNT V
COMMON LAW UNJUST ENRICHMENT

71. Windows USA repeats and incorporates by reference each and every allegation contained in the previous paragraphs, and further alleges as follows.

72. The Defendants have taken and continue to take for themselves revenues and property rights belonging to Windows USA for the purposes of enhancing the commercial value of its own business.

73. As a direct and proximate result of its unlawful and improper acts, the Defendants have been unjustly enriched and Windows USA has suffered, and will continue to suffer, loss of profits by virtue of the Defendants' conduct.

74. Due to the actions of the Defendants described above, equity and good conscience demand that the Defendants be disgorged of the profits they have received from the use of Windows USA's trade name in the Defendants' advertisements, and enjoined from any further use thereof.

PRAYER FOR RELIEF

WHEREFORE, Windows USA prays that the Court enter a judgment against the Defendants, jointly and severally:

a) For a permanent injunction against the Defendants and their agents, servants, employees and attorneys and those persons acting in concert or participation with them who receive actual notice thereof by personal service or otherwise:

i. Restraining any such persons or entities from using "WINDOWS USA" (however spelled, whether capitalized, abbreviated, singular or plural, printed or stylized, or otherwise) or other terms confusingly similar thereto in any manner relating to the sale of windows;

ii. Restraining any such persons or entities from utilizing "WINDOWS USA" (however spelled, whether capitalized, abbreviated, singular or plural, printed or stylized, or otherwise) or other terms confusingly similar thereto on any website owned and or operated by or on the Defendants' behalf;

iii. Restraining such persons from using "WINDOWS USA" (however spelled, whether capitalized, abbreviated, singular or plural, printed or stylized, or otherwise) or other terms confusingly similar thereto in connection with the promotion, advertising, offering, manufacturing, distributing or selling of the Defendants' services or any products or services of QuinStreet clients.

b) Finding that the WINDOWS USA mark has become distinctive by attaining secondary meaning with the public, and that Windows USA has the exclusive right to use the WINDOWS USA mark in connection with the sale and/or marketing of non-metal windows;

c) Finding that, by the acts complained of above, the Defendants have engaged in trademark infringement in violation of 15 U.S.C. § 1114(1);

d) Finding that, by the acts complained of above, the Defendants have engaged in trademark infringement in violation of the common law;

e) Finding that, by the acts complained of above, the Defendants have engaged in trademark infringement in violation of Ark. Code Ann. § 4-71-212;

f) Finding that, by the acts complained of above, the Defendants have engaged in false association in violation of 15 U.S.C. § 1125(a)(1)(A);

g) Finding that, by the acts complained of above, the Defendants have engaged in false advertisement in violation of 15 U.S.C. § 1125(a)(1)(B);

h) Finding that, by the acts complained of above, the Defendants have engaged in deceptive trade practices in violation of Ark. Code Ann. § 4-88-107;

i) Finding that, by the acts complained of above, the Defendants have been unjustly enriched;

j) Finding that the acts complained of above were willful, intentional and malicious;

k) Ordering Defendants to account to the Court for all gains, profits, savings and advantages obtained by the Defendants as a result of the acts complained of above, and further, to disgorge to Windows USA restitution in the amount of such gains, profits, savings and advantages;

l) An award of the actual damages suffered by Windows USA attributable to Defendants' as a result of the acts complained of above, in an amount to be determined at trial;

m) A declaration that this is an "exceptional case" due to the willful nature of Defendants' false advertising, and awarding enhanced damages and attorneys' fees pursuant to 15 U.S.C. § 1117 to the fullest extent allowable by law;

n) An award of prejudgment and post-judgment interest on any monetary award in the action;

o) An award of the costs and expenses of this action; and

p) Such other and further relief as this court may deem just and proper.

Respectfully submitted,

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